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IN THE MATTER OF A PETITION BY CYRUS DAS

HIGH COURT SABAH & SARAWAK, KUCHING
SUPANG LIAN J
[APPLICATION FOR AD HOC LICENCE
TO PRACTICE NO: KCH-17D-6-10-2018]
B 19 OCTOBER 2018

LEGAL PROFESSION: *Practice of law – License – Petition for ad hoc licence to practice in Federal Court sitting at Sarawak – Whether petitioner possessed required qualifications – Whether other lawyers in Sarawak have been approached and they* C *have declined to take up case – Whether no lawyer in Sarawak could handle matter – Whether in best interest of justice to give clients chance to have petitioner present case – Sarawak Advocates Ordinance 1953, ss. 4(1) & 10(c)(i), (ii)*

HSBC Bank Malaysia Bhd ('the respondent') had commenced a suit, at the High Court, against RJ Timur Sdn Bhd and four others, including the D applicants, as guarantors. The High Court delivered its judgment against the applicants and an appeal to the Court of Appeal was not successful. The applicants were represented by Mr Lo at the High Court and the Court of Appeal. In the present petition, the petitioner applied for an *ad hoc* licence to practice in the Federal Court sitting at Kuching, Sarawak for the notice E of motion for leave of appeal to the Federal Court and the appeal proper, if any, emanating from it, pursuant to s. 10(c)(i) and (ii) of the Sarawak Advocates Ordinance 1953 ('SAO'). Mr Lo, on behalf of the petitioner, submitted that (i) the petitioner, in his 45 years of practice, accumulated the relevant and requisite specialised knowledge required for the Federal Court F matter and was well-versed with the legal issues arising from the notice of motion, which were not only novel but also complex; and (ii) Mr Lo was counsel that had argued the matter at the High Court and Court of Appeal and on both occasions, the decisions were against him. According to Mr Lo, in reality, the experience he had in the banking field was a tiny percentage G of the experience of the petitioner. Opposing the petition, the Sarawak State Attorney-General, the Advocates' Association of Sarawak and the respondent argued that, *inter alia*, (i) Mr Lo himself had the experience and qualification to see the leave application through at the Federal Court; (ii) there were no averments that other lawyers in Sarawak had been approached and that they had declined to take up the case; and (iii) there was H no averment that no lawyer in Sarawak could handle the matter.

Held (allowing petition with costs):

(1) Pursuant to s. 10(c) of the SAO, upon the application of a petitioner, who has the qualifications stated in s. 4(1) of the SAO, the Chief Judge, I or in his absence from Sarawak, a judge, in his absolute discretion, could grant permission to the petitioner to practice in any cause or matter if

(i) the petitioner had been instructed by a local advocate; and (ii) having regard to all the relevant circumstances, it was in the interest of justice to grant such permission. There was no denying that the petitioner fulfilled the qualifications stated in s. 4(1) of the SAO and the requirements of s. 10(c)(i) of the SAO were also met. (paras 6 & 7)

(2) The Federal Court is the last chance for the applicants, in that, if they could not succeed to get leave to appeal to the Federal Court, the matter ends there for them. Having regard to what Mr Lo said as to what he had achieved, or failed to achieve, at the High Court and the Court of Appeal, it was in the best interest of justice to give the applicants the chance to have the petitioner present their case for them. It was the best and only chance that the applicants had. Furthermore, it was equally beneficial for the development of Sarawak Bar for Sarawak lawyers to appear with an eminent and experienced counsel of the likes of the petitioner. Appearing with an eminent counsel would be an invaluable learning experience. (paras 18 & 19)

Case(s) referred to:

Datuk Hj Mohammad Tufail Mahmud & Ors v. Dato' Ting Check Sii [2009] 4 CLJ 449 FC ***(refd)***

Datuk Syed Kechik Syed Mohamed & Anor v. The Board Of Trustees Of The Sabah Foundation & Ors [1999] 1 CLJ 325 FC ***(refd)***

In Re Datuk Seri Gopal Sri Ram [2014] 1 LNS 952 HC ***(refd)***

In Re Datuk Seri Gopal Sri Ram [2014] 1 LNS 1609 HC ***(refd)***

Ooi Boon Leong & Ors v. Citibank NA [1984] 1 LNS 26 PC ***(refd)***

Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor And Other Applications [2011] 1 CLJ 51 FC ***(refd)***

Legislation referred to:

Advocates Ordinance 1953 (Sarawak) (Cap 110), ss. 4(1), 8, 10(c)(i), (ii)
Courts of Judicature Act 1964, s. 96

For the petitioner - George Lo & Jonathan Tay; M/s George Lo & Partners
For the State Attorney General - McWillyn Jiok; SLO, Sarawak
For the Advocates' Association Sarawak - Arthur CA Lee
For the respondent - Chan Siew Yan

Reported by Najib Tamby

JUDGMENT

Supang Lian J:

[1] Before me is the application of the petitioner, Mr Cyrus Das, for *ad hoc* licence to practice in the Federal Court sitting at Kuching in the State of Sarawak for the notice of motion for leave to appeal to the Federal Court in Federal Court Civil Application No. 08(F)-95-03-2018(Q) and the appeal proper (if any) emanating therefrom pursuant to s. 10(c)(i) and (ii) of the Sarawak Advocates Ordinance 1953 ("SAO").

[2] The application is supported by the following:

(i) Affidavit affirmed by the petitioner, Cyrus Das, affirmed on 16 October 2018;

(ii) Affidavit affirmed by a local advocate and solicitor, George Lo Kuin Fah affirmed on 16 October 2018 who is representing the clients; and

(iii) Affidavit affirmed by Ng Chee Kian on 16 October 2018 on behalf of the clients.

[3] The application is opposed by several parties, namely:

(i) the respondent (HSBC Bank Malaysia Bhd) in the notice of motion in the Federal Court;

(ii) the Advocates' Association of Sarawak; and

(iii) the State Attorney General's Chambers.

[4] The right to practice law in Sarawak is governed by s. 8 of the SAO which reads as follows:

> **Section 8. Right to practice in Sarawak.**
>
> (1) Subject to subsection (2) and to section 9, advocates shall have the exclusive right to practice in Sarawak and to appear and plead in the Federal Court in Sarawak and the High Court, and in all courts in Sarawak subordinate thereto in which advocates may appear, and, as between themselves, shall have the same rights and privileges without differentiation: …

[5] The Federal Court in *Datuk Hj Mohammad Tufail Mahmud & Ors v. Dato' Ting Check Sii* [2009] 4 CLJ 449 gives recognition to this exclusive right of audience enjoyed by the Sarawak lawyers in the courts. The court held:

> Article 161B of the Constitution, which was mentioned in s. 87(9) of the Malaysia Act, is self-explanatory. It forms the safeguard for the Sabah and Sarawak Bars which restricts the right to practise only to its resident advocates as agreed to by the respective State Legislations.

[6] That said, pursuant to s. 10(c) of the SAO, upon the application of a petitioner who has the qualifications stated in s. 4(1) of the SAO, the Chief Judge or in his absence from Sarawak, a judge, in his absolute discretion, can grant permission to the petitioner to practice in any cause or matter if (i) the petitioner has been instructed by a local advocate and (ii) having regard to all the relevant circumstances, it is in the interest of justice to grant such permission.

[7] There is no denying that Mr Cyrus Das has fulfilled the qualifications stated in sub-s. (1) of s. 4 of SAO. Also, the requirements of s. 10(c)(i) of the Ordinance are met.

[8] The background facts leading to the filing of the notice of motion for leave to appeal to the Federal Court that I can gather from the submissions of Mr George Lo, of learned counsel for the petitioner and Ms Chan Siew Yan of learned counsel for the respondent in the notice of motion are these.

[9] In July 2013, HSBC Bank Malaysia Berhad commenced Suit No. KCH-22-57-7-2013 in the High Court against the borrower (RJ Timur Sdn Bhd) and four others, including the two applicants in the notice of motion, as guarantors. The claim against the applicants was based on seven guarantees executed by the applicants who were also shareholders and directors of the borrowing company. The guarantees were undisputed and have express provisions for the applicants to guarantee the repayment of moneys owing by the borrowing company. Judgment was entered against the borrowing company. The latter was subsequently wound up and the judgment sum (which is the same sum claimed against the applicants as guarantors) remained unpaid.

[10] The trial in the High Court proceeded in August 2016 and Mr George Lo was acting for the applicants. On 16 December 2016 the High Court delivered judgment against the applicants. The applicants appealed to the Court of Appeal against the High Court decision in January 2017. The appeal was also conducted by Mr George Lo. The Court of Appeal dismissed the applicants' appeal on 7 February 2018. The applicants filed the notice of motion for leave to appeal to the Federal Court on 6 March 2018. In their affidavit in support, eight questions were posed for the consideration of the Federal Court.

[11] Notice of hearing of the notice of motion was issued by the Federal Court Registry on 12 September 2018 requiring counsel to file written submissions and authorities by 10 October 2018. On 3 October 2018, the applicants filed and served affidavit no. 3. On 9 October 2018, the respondents filed written submissions and authorities as directed. That same afternoon, the applicants filed another affidavit no. 4 to add to and vary the questions posed to the Federal Court under the notice of motion. On 10 October 2018, the respondent informed the Federal Court and the applicants' counsel of its objection to the variations in the questions posed, especially after the respondent has already submitted its written submissions based on the earlier questions posed. On 12 October 2018, the hardcopy of the applicants' affidavit no. 4 was served on the respondent's counsel and the same was accepted under protest and without prejudice. Then came the filing of the present petition on 16 October 2018.

A **[12]** The questions of law proposed in the notice of motion are:

(a) Whether the principle laid down in *Ooi Boon Leong & Ors v. Citibank N.A.* [1984] 1 LNS 26; [1984] 1 MLJ 222 that parties could contract out of the provisions of the Contracts Act 1950 would apply to guarantors seeking discharge of their liability on the basis that they did not have the
B opportunity to consent or agree to the terms of the restructured facility or replacement facility now sought to be enforced against them.

(b) Whether a guarantor under a bank facility that had lapsed or extinguished could continue to be liable under a restructured facility or replacement facility that did not have his consent and or where he had
C refused consent.

(c) Whether it is legally permissible for a bank to enforce a restructured facility or replacement facility against a guarantor who had earlier refused consent and/or was not notified of the substitution of his
D guaranteed facility with a new restructured or replacement facility.

(d) Whether the rule in *Turquand*'s case can apply where the bank has had knowledge, actual or constructive, of litigation amongst the shareholders and directors of the borrower company and is aware that the applicants/ directors constituting 50% of the board of directors had refused to
E consent to the offer to restructure the existing loan.

(e) Whether in the circumstances the bank had acted *bona fide* by dealing exclusively with the director called Wong Hie Sing and dispensing with the requirement of consent from the other directors, ie, the applicants.

F (f) Where the trial judge erroneously relied upon an ID document as evidence of an "appeal" for the term loan, and further relied on a purported "extract of minutes" as alleged "acceptance by the borrower" of the term loan without the maker being called, ought not the judgment be set aside in the interests of justice so that justice is seen to be done.

G (g) Where the respondent's witnesses admit having possession of relevant documents and refuse to produce them despite being directed by the court to return to Kuala Lumpur to obtain them, can the court refuse to draw an adverse inference against the respondent simply on the speculative basis that the applicants probably have access to those
H documents.

(h) Ought the court fall back on the "four corners of a guarantee" to find the guarantors liable without regard to the clear evidence of collusion between the respondent and Wong and Yung in this case and the procedural irregularities at trial.

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(i) Where the maker of a certificate of indebtedness admit to being unable to confirm the truth or accuracy of the contents thereof, can the bank refuse to produce the actual statements of accounts which the witness admits are available.

[13] Mr George Lo argues that the issues arising from the notice of motion for leave to appeal require, *inter alia*, the following:

(a) intricate appreciation and dissection of the law relating to the nature, extent and legal availability of preservation of guarantees for a new facility which is granted without the consent of the guarantor and with the earlier termination of the original facility;

(b) full analysis into the true legal interpretation to be given to a guarantee in such a scenario whilst balancing it against the commercial law realities and banking law demands;

(c) deep understanding and analysis into the distinction between variation of a facility and those that are beyond variation after the original facility had been terminated months prior to the new facility.

[14] It was submitted that Mr Cyrus Das has in his 45 years of practice accumulated the relevant and requisite specialised knowledge required for the Federal Court matter and is well versed with the legal issues set out above which are not only novel but also complex.

[15] Mr McWillyn Jiok for the SAG, Mr Arthur Lee for the AAS and Ms Chan Siew Yan for the respondent in the notice of motion have submitted and given their reasons for objecting to the application. They have substantially the same arguments which can be summarised as follows:

(i) Mr George Lo himself has all the experience and qualification to see the leave application through at the Federal Court;

(ii) There are no averments in the affidavit of Mr George Lo that other lawyers in Sarawak have been approached and they have declined to take up the case. There is also no averment that there is no lawyer in Sarawak that can handle this matter;

(iii) Following the decision of Yew Jen Kie J in *Petition for Ad-Hoc Licence to Practice No: KCH-17D-2/6-2014 In Re Datuk Gopal Sri Ram* [2014] 1 LNS 952 and *Petition No: KCH-17D-3/10-2014 In Re Datuk Gopal Sri Ram* [2014] 1 LNS 1609, even if there are novel issues in this matter, the issues of guarantors' liability (especially in the present case where the guarantees are undisputed and there are clearly expressed provisions therein that are supported by settled law and authorities) are not so complex that it cannot be handled by the lawyers here in Sarawak;

(iv) The timeline given in the background above begs the question of whether this petition is in fact another ploy to delay the hearing of the notice of motion which is scheduled for hearing on 24 October 2018. If indeed Mr George Lo was unable to handle the appeal, the application could have been done way back in March 2018 instead of waiting until now;

(v) It is settled law that application for leave to appeal to the Federal Court is subject strictly to the conditions laid in s. 96 of the Courts of Judicature Act 1964. The criteria for determination are well settled and explained in *Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor & Other Applications* [2011] 1 CLJ 51; [2011] 1 MLJ 25 and *Datuk Syed Kechik Syed Mohamed & Anor v. The Board Of Trustees Of The Sabah Foundation & Ors* [1999] 1 CLJ 325; [1999] 1 MLJ 257. There is nothing complicated or new to justify appointing Mr Cyrus Das to take over conduct of the matter; and

(vi) The case of *Ooi Boon Leong*, *supra*, has been cited and followed in numerous subsequent cases which shows that the law relating to express provisions in the guarantee is well settled and not novel.

Finding

[16] With respect, in my opinion there is only one test to be applied when considering a petition under s. 10(c) of SAO. It is, whether having regard to all circumstances, it is in the interest of justice to grant permission to practice. In response to the point raised by the SAG, AAS and the respondent that there is no affidavit to state that other counsels in Sarawak had been asked to handle the case and that Mr George Lo himself is very experienced and have appeared numerous times in the Court of Appeal and the Federal Court, Mr George Lo says that his years of experience at the Bar is the very reason he had found it difficult to approach other counsels in Sarawak to lead him in the matter.

[17] Mr George Lo states that learned counsel for the respondent in the notice of motion, the SAGC and AAS have been very kind in asserting that he is well qualified and experienced to see the matter through to the Federal Court. However, as is known to all parties, he was counsel that had argued the matter in the High Court and Court of Appeal. On both occasions, the decision was against him. Meaning to say he did his best, but it was not good enough. And this is a fact he cannot deny, he says. Indeed, he has handled many cases in the appellate courts, but save for the case of *Pantai Bayu Emas*, the others are not banking cases. In any case, the only question posed in *Pantai Bayu Emas* was whether a vesting order made in the High Court in Malaya applies in Sabah and Sarawak. The Federal Court had decided against him. He says that in reality the experience he has in the field of banking is a tiny percentage of the experience of Mr Cyrus Das.

[18] I feel that Mr George Lo is being modest about his qualifications and abilities to handle the matter. Nevertheless, I agree with him that the stark truth is that the Federal Court is the last chance for the applicants in that if they cannot succeed to get leave to appeal to the Federal Court, the matter ends there for them. Having regard to what Mr George Lo has said as to what he had achieved or failed to achieve in the High Court and the Court of Appeal, it is in the interest of justice to give the applicants the chance to have Mr Cyrus Das present their case for them. It is the best and only chance that the applicants have.

[19] With regard the contention that handling the case by Sarawak lawyers on their own is an opportunity to develop the Sarawak Bar, I am inclined to agree with Mr George Lo that it is equally beneficial for the development of the Sarawak Bar for Sarawak lawyers to appear with eminent and experienced counsels of the likes of Mr Cyrus Das. Appearing with an eminent counsel would be an invaluable learning experience.

Order

[20] Having regard to all the circumstances of this case, I am of the opinion that in the interest of justice, the petition ought to be allowed with cost of RM3,000 to the respondent (HSBC Bank Malaysia Bhd). I so order.